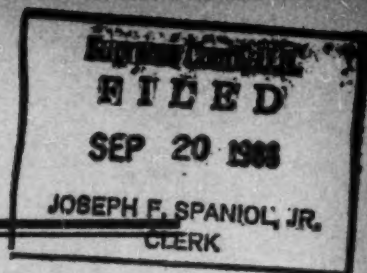


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No. 88-217



IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION,
Petitioner,
v.

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
and the RAILWAY LABOR EXECUTIVES' ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

**BRIEF OF RESPONDENT
RAILWAY LABOR EXECUTIVES' ASSOCIATION
IN OPPOSITION TO THE PETITION**

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On August 5, 1988, petitioner Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the decision of that court in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420 (3rd Cir. 1988). Respondent Railway Labor Executives' Association [hereinafter, RLEA"] sub-

mits that the ICC lacks standing to seek a writ of certiorari and, therefore, RLEA respectfully submits this brief in opposition to the ICC's petition.

JURISDICTION

Respondent RLEA respectfully submits that this Court does not have jurisdiction under 28 U.S.C. § 1254(1) to grant the ICC's petition because the ICC lacks standing as it has no independent right of its own to protect in this proceeding.

STATUTES INVOLVED

Respondent RLEA respectfully submits that this case does not involve Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104.

COUNTERSTATEMENT OF THE CASE

While respondent RLEA disagrees with the initial portion of petitioner's Statement Of The Case, it is not necessary to address those disagreements in this brief. Rather, in respondent RLEA's opinion, what is relevant to this Court's consideration of the ICC's petition is the following:

On September 19, 1987, P&LE Railco, Inc. filed a Verified Notice of Exemption with the Commission to exercise the class exemption which the Commission had granted under 49 U.S.C. § 10505 to all newly-formed rail carriers from the prior approval requirements of 49 U.S.C. § 10901 when such new carriers sought to acquire and to operate existing lines of railroad. That class exemption had been granted by Ex Parte No. 392 (Sub-No. 1), *Class Exemption For the Acquisition And Operation Of Rail Lines Under 49 U.S.C. 10901* [hereinafter, "*Ex Parte 392*"], 1 I.C.C.2d 810 (1985), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table), and was to be effective in individual cases

seven (7) days after a Verified Notice of Exemption was filed by any new carrier exercising that exemption. App. F at 135a.¹ RLEA sought a stay of that exemption, but on September 25, 1987, the ICC, by a divided vote, denied that stay. App. E at 103a.

Respondent RLEA had sought a stay of that exemption because, for among other reasons, it maintained that the sale was not within the scope of 49 U.S.C. § 10901, but rather, was actually a sale of an existing line of railroad to a rail system, and thus, RLEA maintained, was within the scope of 49 U.S.C. § 11343(a)(2). Prior to seeking that stay, RLEA had filed a complaint with the ICC challenging the appropriateness of using 49 U.S.C. § 10901 as the governing statutory provision (*i.e.*, ICC Finance Docket No. 31126, *RLEA v. Pittsburgh & Lake Erie R.R.*) and that complaint, as well as RLEA's specific objection to the two relevant exemption proceedings (*see*, ICC Pet. at 9 n.10), are still pending.

Prior to the filing of the Verified Notice of Exemption by P&LE Railco, RLEA had appealed to the district court to enforce the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and the rail employees themselves had exerted their economic power to enforce their collective bargaining rights; those efforts have resulted in the two petitions by the Pittsburgh & Lake Erie Railroad Company [hereinafter, "P&LE"] for writs of certiorari which are currently pending before this Court in Sup. Ct. Nos. 87-1888 and 1589, *P&LE v. RLEA*.

Although the ICC was well aware of the proceedings before the United States District Court for the Western District of Pennsylvania concerning both RLEA's efforts to enforce the Railway Labor Act and the P&LE's efforts to enjoin rail labor's strike, the ICC did not attempt to

¹ "App." as used herein refers to the Appendix filed with the ICC's petition.

intervene before the district court. Rather, the Commission sought to intervene only when the litigation had reached the appellate level. Petitioner ICC's request to intervene in the appeal by RLEA from the district court's strike injunction was denied, but the Commission was permitted to participate as an *amicus curiae* in that case. 831 F.2d 1231 (3rd Cir. 1987), *pet. for cert. pending*, Sup. Ct. No. 87-1589. However, the Commission was permitted, over RLEA's objections, to intervene as a party in the P&LE's appeal from the district court's status quo injunctive order which is the subject of the petition pending before this court in No. 87-1888.

While the P&LE's appeal was pending before the United States Court of Appeals for the Third Circuit, the P&LE took the position that its sale agreement with P&LE Railco, Inc. had terminated. *See*, App. H at 29a n.8. Railco and its corporate affiliates disagreed with that position, but on July 12, 1988, Railco and its corporate parent, Chicago West Pullman Transportation Corporation [hereinafter, "CWP"], informed the Third Circuit in a case dealing with RLEA's challenge to the financial structure of the Railco sale transaction that: "[B]y virtue of a settlement agreement entered into between the parties [*i.e.*, CWP and P&LE], the sales agreement between CWP and Pittsburgh & Lake Erie has no further force or effect. Thus, the conveyance which is the subject of the above-captioned action will not take place." Letter of Thomas R. Johnson, Counsel for CWP, dated July 12, 1988, to Clerk, Third Circuit, in 3rd Cir. No. 87-3853, *RLEA v. P&LE*.

Since the sales agreement is now terminated, the permissive exemption to P&LE Railco which became effective on September 26, 1987, is now moot, and, RLEA respectfully submits, the ICC's interest in this case, if it ever existed, is no longer justiciable.

REASONS FOR DENYING THE WRIT

Although RLEA agrees with petitioner ICC and with the rail industry generally that the conflict presented by recent court of appeals decisions dealing with the proper relationship of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, to the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, merits review by this Court, respondent RLEA respectfully submits that the petition by the ICC is not a proper vehicle to achieve this review. Respondent RLEA submits that the ICC lacks standing to seek review of the Third Circuit's decision in *RLEA v. P&LE*, 845 F.2d 420, for it does not have a personal stake in the outcome of the controversy. *E.g.*, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Warth v. Seldin*, 422 U.S. 490 (1975). This Court, respondent respectfully submits, should deny the ICC's petition due to the absence of a justiciable case or controversy.

Petitioner ICC Does Not Have Standing To Challenge The Third Circuit's Decision Since It Has Not Suffered A Legally Cognizable Injury, Either Actual Or Threatened, As A Result Of The Status Quo Injunction.

It is axiomatic that federal courts are courts of limited jurisdiction, and that this jurisdiction is further limited by the requirement of Article III of the Constitution of the United States that an actual "case or controversy" exist. *E.g.*, *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). However, a case or controversy does not exist where, as in this case, a petitioner lacks standing to prosecute his claim—*i.e.*, lacks "such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Id.* at 498-99 (emphasis in original), quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962). Moreover, even when a petitioner has a "personal stake" in the controversy, that individual may still lack standing "under the prudential principles by

which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979); cf., *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984). "[O]ne of these prudential principles is that the plaintiff generally must assert his own legal rights and interests." *Hodel v. Irving*, 481 U.S. —, 95 L. Ed.2d 668, 677 (1987).

In this case, the ICC maintains that it has a legally cognizable interest in this litigation to protect the integrity of its orders from collateral attack. Pet. at 14. However, petitioner has not identified any Act of Congress which gives it specific authority to invoke the aid of the federal courts to protect its orders against a collateral attack. Rather, petitioner relies upon 28 U.S.C. § 2323 which gives the ICC and others the right to "appear as parties . . . in any action involving the validity of such [ICC] order . . . or any part thereof" That section, RLEA submits, does not give the ICC the right to initiate the action, but merely gives it the right to intervene when its orders are being challenged *directly*.

But even if Section 2323, or general principles of law (e.g., *Coleman v. Miller*, 307 U.S. 433, 442 (1939)) gave the ICC the right to appear as a party in a proceeding which the ICC asserts involves a collateral, as contrasted with direct, challenge to its orders, whatever right the Commission may have had to participate as a party in this case ceased on July 12, 1988, when P&LE Railco terminated its purchase agreement with the P&LE. Commission orders exempting rail transactions from regulation under Section 10901 of the Interstate Commerce Act, like ICC merger orders, are permissive; they do not mandate that the parties consummate the transaction. Cf., *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S.

298 (1954); *New York Central Securities Corp. v. United States*, 287 U.S. 12, 26-27 (1932). Consequently, if the parties themselves do not consummate the approved or exempted transaction, the Commission may not bring an action in federal court to compel them to consummate the transaction. Here, since the parties to the P&LE—P&LE Railco sale have agreed not to go forward with that sale, whatever interest the ICC may have had in protecting from collateral attack its orders exempting that sale from regulation, necessarily disappeared with the demise of the specific sale which had been exempted from regulation.

Although RLEA submits that the petition in No. 87-1888 is not moot,² the live case or controversy presented by No. 87-1888 does not, respondent submits, give the ICC standing to seek its own writ. Here, the ICC since July 12, 1988, cannot be viewed as protecting its orders in this case from attack, either directly or collaterally. Rather, the ICC is seeking a ruling of law that its orders *in general* supersede rail labor's Railway Labor Act and collective bargaining rights. Since no specific order of the ICC is at issue in this case, petitioner ICC cannot show that it "personally has suffered some actual or threatened injury as a result" of rail labor's enforcement of the Railway Labor Act before a new rail carrier exercises the exemption granted by *Ex Parte 392* for a future, but yet unknown, sale of the P&LE. Any injury about which the ICC may be complaining in its petition in No. 88-217, necessarily involves the P&LE's rights, and not the ICC's rights under the Interstate Commerce Act. Consequently, RLEA respectfully submits, the ICC lacks standing to seek its own writ of certiorari in this case.

² RLEA takes this position because the P&LE is obligated by the injunctive order not to sell to any purchaser until it has completed the labor statute's bargaining processes. That order, thus, continues to bind the P&LE, even though the carrier's agreement with CWP has expired.

CONCLUSION

Respondent RLEA respectfully submits that the ICC's petition for a writ of certiorari should be denied.

Respectfully submitted,

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